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6 UNITED STATES DISTRICT COURT

7  
8 NORTHERN DISTRICT OF CALIFORNIA

9  
10 MARY CALDWELL,

11 Plaintiff,

No. C 19-02861 WHA

12 v.

13 UNITEDHEALTHCARE  
14 INSURANCE COMPANY and  
15 UNITED HEALTHCARE  
16 SERVICES, INC.,

17 Defendants.

18  
19 ORDER RE MOTIONS FOR  
20 FINAL APPROVAL OF  
21 CLASS SETTLEMENT AND  
22 ATTORNEY'S FEES AND  
23 COSTS

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24 INTRODUCTION

25 In this certified class action to recover health benefits under an ERISA plan, plaintiffs  
26 move for final approval of class settlement and for attorney's fees and costs. Defendant  
27 insurers oppose the latter, but not the former. To the extent stated herein, plaintiffs' motions  
28 are **GRANTED**.

29 STATEMENT

30 The facts of this action, briefly summarized below, are explained in greater detail in prior  
31 orders. *See Caldwell v. UnitedHealthcare Ins. Co.*, No. C 19-2861 WHA, 2020 WL 7714394,  
32 at \*1–2 (N.D. Cal. Dec. 29, 2020). Plaintiff Mary Caldwell brought this action on behalf of  
33 herself and all others similarly situated against defendants UnitedHealthcare Insurance

1 Company and United HealthCare Services Inc. (together, “United”). Plaintiff alleges that  
2 United violated ERISA by improperly denying on a categorical basis all health insurance  
3 claims for liposuction to treat lipedema as unproven and not medically necessary. A prior  
4 order certified the following class: “All persons covered under ERISA health plans, self-  
5 funded or fully insured, that are administered by United and whose claims for specialized  
6 liposuction for treatment of their lipedema were denied as unproven between January 1, 2015  
7 and December 31, 2019.” *Id.* at 6. Based on United’s records, the class thus consists of 28  
8 members (Dkt. No. 205).

9 The parties have moved for class settlement three times, having been rejected twice  
10 before. The first proposed settlement was rejected because “class counsel get vast amounts of  
11 cash but the class members get merely a cosmetic settlement.” *Caldwell v. UnitedHealthcare*  
12 *Ins. Co.*, No. C 19-02861 WHA, 2021 WL 5359428, at \*1 (N.D. Cal. Oct. 12, 2021). The  
13 second try fared better in that it was no longer a collusive deal, but any purported benefit to the  
14 class remained illusory (Dkt. No. 225). The parties’ third proposed settlement was  
15 preliminarily approved in July 2023, with the caveat that class members’ participation in the  
16 settlement post-approval would shed light on whether the purported benefits could be realized  
17 (Dkt. No. 251).

18 No class member opted out of the settlement, although two object, only one of which was  
19 timely made (Baessler Decl. ¶¶ 23–29). A patient advocate, Ms. Karie Kozak, appeared at the  
20 final approval hearing on behalf of three class members to inform the court of her concern  
21 regarding the practical use of the settlement for class members who no longer have United  
22 HealthCare insurance and her concern regarding the cost of lipedema surgery. After hearing  
23 from Ms. Kozak and both parties, the court found that class members who no longer have  
24 United HealthCare insurance are addressed under the terms of the settlement and may submit a  
25 request to United to review their claim. However, because the cost of lipedema is outside the  
26 scope of this matter, Ms. Kozak’s second objection was overruled. This order follows full  
27 briefing and oral argument.

**ANALYSIS**

This order addresses the outstanding motions for class settlement and attorney's fees in order.

**1. FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT.**

Plaintiff moves for final approval of the proposed class settlement (Dkt. No. 257). Defendants have filed a statement of non-opposition (Dkt. No. 258).

Rule 23(e) provides that “[t]he claims, issues, or defenses of a certified class . . . may be settled, voluntarily dismissed, or compromised only with the court’s approval.” When a proposed settlement agreement is presented, the court must perform two tasks: (1) direct notice in a reasonable manner to all class members who would be bound by the proposal, and (2) approve the settlement only after a hearing and on finding that the terms of the agreement are fair, reasonable, and adequate. FRCP 23(e)(1)–(2). “The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks.” *Officers for Just. v. Civ. Serv. Comm’n of S.F.*, 688 F.2d 615, 623 (9th Cir. 1982).

**A. Adequacy of Notice.**

For class notice of settlement to be adequate, it must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). It must also “describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980).

The undersigned judge previously approved the form, content, and planned distribution of the class notice. Revisions to the proposed class notice were ordered at the hearing granting preliminary approval of class settlement, and a subsequent order issued prescribing further revisions before ultimately approving the class notice (Dkt. Nos. 248, 250, 251). The settlement administrator asserts that the approved class notice of settlement was mailed to all 28 class members on August 10, 2023, all of which were delivered. The 23 class members

1 with an email address on file were also emailed the class notice on August 10, 2023. A class  
2 notice regarding a change in the final settlement approval hearing date was also mailed and  
3 delivered to all 28 class members (Baessler Decl. ¶¶ 9–16).

4 The settlement administrator has fulfilled the notice plan given the foregoing. This order  
5 accordingly finds that notice to class members was adequate. Additionally, class counsel is  
6 ordered to submit a report to this court by **JANUARY 31, 2024**, detailing any efforts made to  
7 inform the class of the settlement and encouraging all class members to avail themselves of it.

8           **B. Fairness of Settlement.**

9 To determine whether a proposed class settlement is fair, reasonable, and adequate, a  
10 district court may consider what is known as the *Churchill* factors: (1) the strength of the  
11 plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3)  
12 the risk of maintaining class action status throughout the trial; (4) the amount offered in  
13 settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the  
14 experience and views of counsel; (7) the presence of a governmental participant; and (8) the  
15 reaction of the class members to the proposed settlement. *In re Bluetooth Headset Prod. Liab.*  
16 *Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361  
17 F.3d 566, 575 (9th Cir. 2004)). That list is not exhaustive, as “[t]he factors in a court's fairness  
18 assessment will naturally vary from case to case.” *Ibid.*

19 Experienced class counsel asserts that plaintiffs have a strong case, given that the state of  
20 the law for showing a treatment is unproven means that “United would have been hard pressed  
21 to carry the heavy burden framed by this Court's summary judgment ruling” (Approval Br. 6,  
22 Dkt. No. 257 (citing *Wise v. MAXIMUS Fed. Servs., Inc.*, 478 F. Supp. 3d 873, 888 (N.D. Cal.  
23 2020) (Judge Lucy H. Koh))). This action teetered on the edge of a bench trial twice before  
24 obtaining a preliminary approval of settlement, so this settlement avoids the risks and expenses  
25 of trial while reflecting a developed litigation record.

26 Ultimately, the settlement grants all 28 class members the relief requested in the  
27 complaint: the settlement covers lipedema surgery for all class members under the terms of  
28 current or past United plans, depending on whether class member still have United coverage.

1       While class counsel represents that “the reaction of the Class Members has been  
2       overwhelmingly positive,” two objections from the class members have been received  
3       (Approval Br. 12). Class member Marianne Klaczynski submitted an objection by the  
4       deadline to do so, October 20, 2023 (Baessler Decl. ¶ 26). Her objection appears to be targeted  
5       at seeking redress outside the scope of our certified class. For example, multiple objections  
6       target United’s current policies on lipedema and how they should be changed (Baessler Decl.  
7       Exh. D ¶¶ 3–5). But class members’ claims being subject to reevaluation under United’s  
8       current policies was explicitly disapproved of when this district court rejected prior settlement  
9       proposals. 2021 WL 5359428, at \*1. Class members under the current settlement are entitled  
10      to coverage irrespective of what United’s current lipedema policies are:

11           A Class Member will be eligible to receive  
12       coverage for previously denied liposuction services  
13       as set forth in this Agreement upon re-review if (i)  
14       she had coverage under her plan at the time of the  
15       original denial, (ii) her surgeon verifies that the  
16       request is for medically necessary liposuction to  
17       treat lipedema, and (iii) the liposuction for lipedema  
18       will be provided in an in-network or out-of-network  
19       setting (e.g., a hospital or ancillary facility in the  
20       United States) as covered under her plan.

21           (Settlement Agreement 10–11, Dkt. No. 233-2). Furthermore, the objection attaches  
22       declarations from several people identified as current or former members of United plans, none  
23       of whom are the 28 class members (Baessler Decl. ¶ 27). Tellingly, those declarations air  
24       grievances over United’s coverage of lipedema, despite the fact that the class settlement covers  
25       class members’ lipedema surgery irrespective of United’s policies (Baessler Decl. Exh. D).  
26       Ms. Klaczynski moreover allowed Karie Kozak to appear on her behalf at the final approval  
27       hearing. As Ms. Kozak explained at the hearing, she runs coverlipedema.com, which helps  
28       advocate for coverage for lipedema surgery (Barrio Decl. ¶¶ 3–5, Dkt. No. 257-1).

29           Ms. Klaczynski also objects that:

30           Retired class members, who after being denied by  
31       UHC, did not have the money to pay cash for  
32       surgery and now do not have access in their area to  
33       UHC Medicare Advantage plans or now have  
34       regular Medicare for other conditions . . . should

receive a cash settlement based in FAIR health non-network rates to proceed with surgery.

(Baessler Decl. Exh. D ¶ 1). The settlement at hand automatically covers expenses for lipedema surgery under the original cost-share plan for all class members who were enrolled in a United plan during the class period (Settlement Agreement 8–11). The objection could mean, however, that certain class members can no longer afford their portion of cost-sharing, and therefore are forced to forgo lipedema surgery altogether. While this order sympathizes, a class member’s current financial situation remains outside the scope of the certified class. The ability to pay the cost-share under a United plan in the first place is outside the scope of this lawsuit, which was to have lipedema surgery covered under United plans. If those class members suffered financial hardship *because* of uncovered lipedema surgery paid for out of pocket, the settlement explicitly reimburses such expenditures pursuant to cost-sharing (Settlement Agreement 8). In any event, the objection does not assert that this concern applies to any of our 28 class members, nor did any of them opt out of this settlement including Ms. Klaczynski herself, so it remains unclear to whom this concern is directed.

The objection that the Special Master should oversee potential re-submission requests because class counsel stands to profit from their obligation to do so is without merit. This order makes clear that class counsel’s attorney’s fees are as laid out in this order, and not contingent upon processing of re-submission requests. Specifically, class counsel shall not receive the full fee amount until the conclusion of the reimbursement and reprocessing phase and all claims have been processed.

The settlement administrator also received a late objection from class member Velma Leggett, postmarked October 21, 2023 (Baessler Decl. ¶ 28). That objection is substantively identical to that of Ms. Klaczynski, and includes the same declarations from parties who are not class members (*see* Baessler Decl. Exh. E). Ms. Kozak likewise spoke on Ms. Leggett’s behalf at the final approval hearing and voiced concern regarding how United will review requests for lipedema surgery coverage by those who do not currently have United insurance but are otherwise covered under the settlement. Ms. Kozak also raised concern for treatments

1 that may be needed after lipedema surgery but may or may not be covered under United  
2 insurance.

3 This order finds the objections to the settlement misplaced and therefore unavailing. A  
4 sticking point in rejecting prior settlements was that the scope of the release should be limited  
5 to the claims asserted in this action. The settlement agreement's release does not apply to any  
6 class member that does not receive a reimbursement or coverage, nor to future, additional  
7 requests for coverage for lipedema surgery (Settlement Agreement 13). This settlement is not  
8 the proper vehicle to address other grievances with United's coverage of lipedema, and class  
9 members themselves are not precluded from pursuing claims not asserted here.

10 Distinct from the eight *Churchill* factors, Rule 23(e)(2) requires "scrutinizing the fee  
11 arrangement for potential collusion or unfairness to the class" by an approving district court,  
12 among other considerations. *Briseño v. Henderson*, 998 F.3d 1014, 1025–26 (9th Cir. 2021).  
13 The first proposed settlement was rejected for precisely those reasons. 2021 WL 5359428, at  
14 \*1. This settlement was approved in part because there was no contingent fee arrangement and  
15 prior concerns had been addressed. Given the foregoing, this order finds that the proposed  
16 class settlement is fair, reasonable, and adequate under FRCP 23(e). Plaintiff's motion for  
17 final approval of class settlement is **GRANTED**.

18 **2. ATTORNEY'S FEES AND COSTS.**

19 A district court must ensure that attorney's fees are "fair, adequate, and reasonable."  
20 *Staton v. Boeing Co.*, 327 F.3d 938, 963–64 (9th Cir. 2003) (quoting Rule 23(e)). Class  
21 counsel seeks fees under the ERISA statute's fee-shifting provision, which states: "In any  
22 action under this subchapter (other than an action described in paragraph (2)) by a participant,  
23 beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and  
24 costs of action to either party." 29 U.S.C. § 1132(g)(1). The Supreme Court has held that this  
25 provision means "a court 'in its discretion' may award fees and costs 'to either party,' . . . as  
26 long as the fee claimant has achieved 'some degree of success on the merits.'" *Hardt v.*  
27 *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 245 (2010) (quoting *Ruckelshaus v. Sierra*  
28 *Club*, 463 U.S. 680, 694 (1983)).

Our court of appeals “has adopted the hybrid lodestar/multiplier approach used by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), as the proper method for determining the amount of attorney’s fees in ERISA actions.” *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (citations omitted). “First, a court determines the ‘lodestar’ amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. . . . Second, a court may adjust the lodestar upward or downward using a ‘multiplier’ based on factors not subsumed in the initial calculation of the lodestar.” *Ibid.* (citations omitted).

Though the lodestar figure is “presumptively reasonable,” . . . the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of “reasonableness” factors, “including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.”

*In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 941–42. “Foremost among these considerations, however, is the benefit obtained for the class.” *Ibid.*

Class counsel seeks \$1,005,170.62 in attorney’s fees. The accompanying declaration explains that a total of 1,909.1 hours were spent on this action, and both the allocation of hours spent and the billing rates of the four lawyers that worked on this action do not seem unreasonable (Davis Decl. 8–10). Class counsel thus calculated a lodestar of \$1,340,227.50, which they then discounted by 25% to arrive at their fee request.

United’s objections to class counsel’s fee request are grounded in prior rejected proposed settlements. United explains that the current request is \$250,000 more than the arrangement provided for in the first rejected settlement. United also argues that the fee request is disproportionate to the benefit conferred upon the class, citing reimbursement caps from prior-rejected settlements and estimates of what coverage payouts would be under the current settlement agreement. United argues that because it made “significant concessions” to settle, class counsel should likewise do so by having their requested fees reduced. United finally attacks class counsel’s fee request for insufficient evidence and for the hours spent to be

1 excessive such that they are unreasonable, specifically asserting that “[t]here was no reason for  
2 Plaintiff’s counsel to spend nearly 400 hours and to incur \$250,000 in fees preparing for a  
3 bench trial that was likely to last only a few days . . . on the verge of being finally settled for a  
4 third time” (Fees Opp. 3–12, Dkt. No. 255).

5 United’s objections are largely without merit. Prior proposed settlements were rejected,  
6 and thus reference to any fee arrangements at the time — which were inappropriate in the first  
7 place — are irrelevant here. Class counsel submits that 128.8 hours were spent on settlement,  
8 while 381.5 hours were spent on trial preparation, representing 6.7% and 20% of total attorney  
9 time spent on this case, respectively (*ibid.*). Each time a proposed settlement was rejected, it  
10 was not until trial was rescheduled and imminent that a new settlement was proposed (Dkt.  
11 Nos. 221, 231). This order will not speculate on the dynamics of settlement negotiations,  
12 which side was more responsible for such delay, or the degree of concessions made to arrive at  
13 settlement. Attorney time preparing for trial does not appear unreasonable given the proximity  
14 to trial when the current settlement was achieved, and class counsel’s 25% discount  
15 nevertheless assuages such concerns.

16 However, the lodestar amount is due for a downward adjustment. The settlement  
17 requires the 28 class members to submit claims to United, including those who have not gotten  
18 lipedema surgery. Purportedly, these renewed applications for coverage of surgery will be  
19 approved, but until those surgeries actually happen and United pays, no benefit will have been  
20 received by such class members. Likewise, for class members who have already had lipedema  
21 surgery and now must submit reimbursement claims, until those checks are cashed no benefit  
22 will have been received. The settlement agreement contemplates that claims will be paid  
23 “within 60 days of receiving the claim, *unless United needs additional information*”  
24 (Settlement Agreement 4.C, Dkt. No. 233-2 (emphasis added)). Class representative Mary  
25 Caldwell has been fighting United over her claim since 2017. There is no telling how much  
26 longer she may have to wait under the terms of the settlement.

27 Class counsel also asserts that “[a]s a direct result of this litigation, United eliminated its  
28 ‘Unproven’ coverage position on Lipedema Surgery from its Omnibus medical policy and no

1 longer denies Lipedema Surgery as ‘unproven’” (Davis Decl. ¶ 32). Of course, even if the  
2 “hundreds of covered surgeries over the next five years, that would otherwise have been denied  
3 as unproven” are attributable to this litigation, those are not benefits the class members here,  
4 who number only 28 (*ibid.*). And just because United no longer outright denies such claims as  
5 “unproven” does not mean it is now automatically covering all lipedema surgery.

6 “[T]he Supreme Court has instructed district courts to instead ‘award only that amount of  
7 fees that is reasonable in relation to the results obtained,’” and to evaluate factors such as “the  
8 quality of representation, the benefit obtained for the class, the complexity and novelty of the  
9 issues presented, and the risk of nonpayment.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654  
10 F.3d at 941–42 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). This action  
11 involved a closed universe of 28 class members, for which the law places the burden on United  
12 to prove that the treatment in question is unproven. See *Caldwell*, No. C 19-02861 WHA,  
13 2021 WL 275467, at \*4 (N.D. Cal. Jan. 27, 2021). Class counsel does not assert that this  
14 action was particularly complex, nor that it contained novel issues or was unique within ERISA  
15 litigation. Class members must still wrangle with United through a claims process without  
16 guarantee of full reimbursement. A further 50% discount is thus warranted to the lodestar  
17 amount, which results in \$670,113.75 in fees.

18 As this settlement provides no cash to the class, attorney’s fees will only be awarded  
19 insofar as a benefit has been conferred to the class. To that end, this order awards class  
20 counsel \$100,000 at this time but permits class counsel to seek additional fees in about a year.  
21 This court will wait and see if class members avail themselves of the settlement and will then  
22 adjust attorney’s fees upon a finding that some additional benefit has been conferred to the  
23 class. Class counsel should therefore file a motion by **NOVEMBER 5, 2024**, which explains the  
24 extent to which class members availed themselves of this settlement in order to justify an  
25 award of additional attorney’s fees.

26 Class counsel also seeks \$125,677.96 in costs, which includes (among other things) fees  
27 for plaintiffs’ expert and the class administrator, deposition costs, and travel costs for  
28 depositions. These expenses were all reasonable and necessary to the litigation, and are of a

1 type customarily billed to a fee-paying client. There have been no objections from class  
2 members to recovery of the requested fees and costs.

3 In light of the foregoing, to the extent stated above, plaintiffs' motion for attorney's fees  
4 is **GRANTED IN PART AND DENIED IN PART**. Class counsel is **AWARDED \$100,000** in  
5 attorney's fees and \$125,677.96 in costs for a total of **\$225,677.96** at this time. Class counsel  
6 may file a motion for this court to adjust attorney's fees by **NOVEMBER 5, 2024** by explaining  
7 how many of the 28 class members have either obtained reimbursement or have had lipedema  
8 surgery approved for coverage and scheduled.

9 **CONCLUSION**

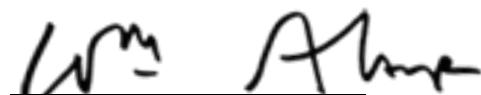
10 For the reasons stated above, final approval of the proposed class settlement is  
11 **GRANTED**. The request for an award of attorney's fees and costs is **GRANTED IN PART AND**  
12 **DENIED IN PART**. Payment of \$225,677.96 shall be made by United within 28 days of this  
13 order. Judgment will be entered accordingly.

14 In addition, class counsel are ordered to submit a report to this court by **JANUARY 31, 2024**,  
15 explaining their efforts to notify class members of the settlement. Class counsel are also  
16 ordered to submit a report to this court by **NOVEMBER 5, 2024**, explaining how many out of the  
17 28 class members have availed themselves of the settlement in order for this court to award  
18 additional attorney's fees.

19 Both sides are ordered to appear in person on **DECEMBER 5, 2024, AT 11:00AM** for a  
20 status conference.

21  
22 **IT IS SO ORDERED.**

23 Dated: December 22, 2023.

24  
25  
26   
27 WILLIAM ALSUP  
28 UNITED STATES DISTRICT JUDGE